

Voting Rights *and the* Kansas Secure and Fair Elections Act



A Briefing Report of the
Kansas Advisory Committee to the
U.S. Commission on Civil Rights

DATE

Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. These committees are composed of state/district citizens who serve without compensation; they are tasked with advising the Commission of civil rights issues in their states/district that are within the Commission's jurisdiction. Committees are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's/district's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states/district.

Acknowledgements

The Kansas Advisory Committee acknowledges

**[STATE] Advisory Committee to the
U.S. Commission on Civil Rights**

The [STATE] Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding

This report details concerns

**[STATE] Advisory Committee to the
U.S. Commission on Civil Rights**

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I. EXECUTIVE SUMMARY

Text

II. INTRODUCTION

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These advisory committees advise the Commission of civil rights issues in their states/district that are within the Commission's jurisdiction.

On January 28, 2015 the Kansas Advisory Committee (Committee) to the U.S. Commission on Civil Rights voted unanimously to conduct a study of the civil rights impact of voting requirements in the state. Specifically, the Committee sought to examine whether the state's 2011 Secure and Fair Elections (SAFE) Act¹ disparately discourages or denies citizens of their right to vote on the basis of race, color, age, religion, national origin, or other federally protected category in local and/or federal elections.

On January 28, 2016 the Committee convened a public meeting in Topeka, KS to hear testimony regarding the implementation and civil rights impact of the Kansas SAFE Act. The following report results from the testimony provided during this meeting, as well as testimony submitted to the Committee in writing during the related period of public comment. It begins with a brief background of the issue to be considered by the Committee. It then presents an overview of the testimony received. Finally, it identifies primary findings as they emerged from this testimony, as well as recommendations for addressing related civil rights concerns. The focus of this report is specifically on concerns of disparate impact resulting from voting requirements in Kansas on the basis of race, color, age, religion, national origin, or other federally protected category. While other important topics may have surfaced throughout the Committee's inquiry, those matters that are outside the scope of this specific civil rights mandate are left for another discussion. A majority of the Committee adopted this report and the recommendations included within it on [Date].

¹ K.S.A. 25-208a, 25-2203, 25-2352 and 25-3203 and K.S.A. 2010 Supp. 8-1324, 25-1122, 25-1122d, 25-1123, 25-1124, 25-1128, 25-2309, 25- 2320, 25-2908, 25-3002, 25-3104, 25-3107 and 65-2418. Full text available at http://www.kslegislature.org/li_2012/b2011_12/asures/hb2067/ (last accessed June 02, 2016)

III. BACKGROUND

A. The United States Voting Rights Act

Following the end of the American Civil War in 1865, the United States Constitution was amended to abolish slavery, and to grant citizenship to former slaves.² On February 3, 1870, the fifteenth amendment to the Constitution was ratified to guarantee that the right of [male] citizens of the United States to vote “shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”³ Despite this proclamation, throughout much of the subsequent American history, state and local jurisdictions resistant to extending voting rights to African American citizens utilized techniques such as gerrymandering; and instituted discretionary, often inconsistently applied requirements such as poll taxes, literacy tests, vouchers of “good character,” and disqualification for “crimes of moral turpitude” in order to suppress the African American vote.⁴ In addition, terrorist organizations such as the Ku Klux Klan, and the Knights of the White Camellia, used harassment and violence to keep African American voters away from the polls. As a result, by the year 1910 nearly all black citizens in the former Confederate States were effectively excluded from voting.⁵

In response to such continued voter intimidation and suppression, on August 6, 1965—nearly 100 years after the ratification of the fifteenth amendment—President Lyndon B. Johnson signed the Voting Rights Act⁶ (VRA) into law. Among its key provisions, the VRA prohibits public officials from “drawing election districts in ways that improperly dilute minorities’ voting power.”⁷ It also requires that states and counties with a “history of discriminatory voting practices or poor minority voting registration rates” secure “preclearance” – that is, the approval of the United States Attorney General, or a three-judge panel of the District Court of the District

² U.S. Constitution, Amendments XIII - XIV

³ The Library of Congress Web Guides: Primary Documents in American History. *15th Amendment to the Constitution*. Available at <https://www.loc.gov/rr/program/bib/ourdocs/15thamendment.html>. (last accessed June 28, 2016). *See Appendix A for a list of other important federal voting laws and requirements.*

⁴ The United States Department of Justice, Introduction to Federal Voting Rights Laws. *Before the Voting Rights Act*. Updated August 6, 2015. Available at: <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> (Last accessed July 12, 2016). Hereafter cited as *DOJ: Before the Voting Rights Act*

⁵ *DOJ: Before the Voting Rights Act*. Updated August 6, 2015. Available at: <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> (Last accessed July 12, 2016)

⁶ 42 U.S.C. §§ 1973 to 1973aa-6

⁷ Cornell University School of Law: Legal Information Institute. *Voting Rights Act*. Wex. Available at https://www.law.cornell.edu/wex/voting_rights_act (last accessed July 12, 2016)

of Columbia – prior to implementing any changes in their current voting laws.⁸ According to the U.S. Department of Justice Civil Rights Division, soon after the VRA was passed, “black voter registration began a sharp increase,” and as a result, the “Voting Rights Act itself has been called the single most effective piece of civil rights legislation ever passed by Congress.”⁹

With the extension of the VRA in 1975, Congress included protections against voter discrimination toward “language minority citizens.”¹⁰ In 1982, the Act was again extended, and amended to provide that a violation of the Act’s nondiscrimination section could be established “without having to prove discriminatory purpose.”¹¹ In other words, regardless of intent, if voting requirements of a particular jurisdiction are found to have a discriminatory impact, they may be found in violation of the VRA.

On June 25, 2013, in a historic decision (*Shelby County v. Holder*), the U.S. Supreme Court ruled that the formula used to determine which states should be subjected to “preclearance” requirements under the VRA was outdated and thus unconstitutional.¹² This ruling effectively nullified the preclearance requirement—a core component of the VRA—until such time as Congress agrees upon a new formula. According to the Brennan Center for Justice at the New York University School of Law, as of March 25, 2016, at least 77 bills to restrict access to registration and voting have been introduced or carried over from the prior session in 28 states.¹³ Though across the country state efforts to expand voter access have outpaced restrictive measures overall, in November of 2016, 17 states (including Kansas) will have restrictive voting

⁸ Cornell University School of Law: Legal Information Institute. *Voting Rights Act*. Wex. Available at https://www.law.cornell.edu/wex/voting_rights_act (last accessed July 12, 2016)

⁹ The United States Department of Justice, Introduction to Federal Voting Rights Laws. *The Effect of the Voting Rights Act*. Last Revised June 19, 2009. Available at: <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0> (Last accessed July 14, 2016).

¹⁰ The United States Department of Justice, History of Federal Voting Rights Laws. *The Voting Rights Act of 1965*. Updated August 8, 2015. Available at: <https://www.justice.gov/crt/history-federal-voting-rights-laws> (Last accessed July 14, 2016). Hereafter cited as *DOJ: The Voting Rights Act of 1965*

¹¹ *DOJ: The Voting Rights Act of 1965*

¹² Supreme Court of the United States: Syllabus. *Shelby County, Alabama v. Holder*, Attorney General et al. Available at: https://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf (last accessed July 21, 2016) *See also*: Schwartz, John. *Between the Lines of the Voting Rights Act Opinion*. The New York Times. June 25, 2013. Available at: http://www.nytimes.com/interactive/2013/06/25/us/annotated-supreme-court-decision-on-voting-rights-act.html?_r=2& (last accessed July 21, 2016)

¹³ Brennan Center for Justice at the New York University School of Law. *Voting Laws Roundup 2016*. April 18, 2016. Available at: <https://www.brennancenter.org/analysis/voting-laws-roundup-2016>. (Last accessed July 21, 2016) Hereafter cited as: *Voting Laws Roundup 2016*

laws in effect for the first time in a presidential election, and the United States will hold its first presidential election in more than 50 years without the full protections of the Voting Rights Act.¹⁴

The right to vote is one of the most fundamental components of democracy—so important, in fact, that the United States Constitution includes *four* amendments protecting it.¹⁵ Established under the Civil Rights Act of 1957, as part of its core mandate, the United States Commission on Civil Rights is directed to “Investigate formal allegations that citizens are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin.”¹⁶ Throughout its history, the Commission and its Advisory Committees have released numerous reports on the state of voting rights in the U.S.¹⁷ The Commission’s hearings on voting rights throughout the American south between 1959 and 1961 have been said to have given critical support to proponents of the VRA, aiding in its 1965 passage.¹⁸ Despite these protections, leading up to and including in the 2016 election cycle, academics and advocates alike have called concern to a number of state-legislated voting restrictions which they say are likely to disproportionately disenfranchise voters of color. In this context, the Kansas Advisory Committee submits this report to the Commission detailing the present state of voting rights in Kansas, and urges the Commission to revisit this topic of national importance.

¹⁴ *Voting Laws Roundup 2016*

¹⁵ U.S. Constitution, Amendment XV guarantees the right to vote “regardless of race, color, or previous condition of servitude”; Amendment XIX guarantees that the right to vote will not be denied “on account of sex”; Amendment XXIV guarantees that the right to vote will not be denied “by any reason of failure to pay poll tax or other tax”; Amendment XXVI guarantees the right to vote for all citizens aged 18 years or older.

¹⁶ Voting, *1961 Commission on Civil Rights Report*, Foreword, p. xv. Available at: <http://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk1.pdf> (last accessed July 21, 2016)

¹⁷ See University of Maryland Francis King Carey School of Law: Thurgood Marshall Law Library: *Historical Publications of the United States Commission on Civil Rights*. Available at: <http://www.law.umaryland.edu/marshall/usccr/subjlist.html?subjectid=75&Submit=Go> (last accessed July 21, 2016)

¹⁸ The Leadership Conference: U.S. Commission on Civil Rights. Available at: <http://www.civilrights.org/enforcement/commission/?referrer=https://www.google.com/?referrer=http://www.civilrights.org/enforcement/commission/> (last accessed July 21, 2016)

B. The Kansas Secure and Fair Elections (S.A.F.E) Act

Voter identification requirements are among the most common type of voting restriction employed by states today.¹⁹ In April of 2008, the United States Supreme Court ruled to uphold an Indiana law requiring voters to provide photographic identification at the polls (*Crawford v. Marion County Election Board*).²⁰ As of the writing of this report, a total of ten states have instituted voter identification requirements that have been identified by the National Council of State Legislators as “strict,” and an additional twenty-two states have “non-strict” voter identification requirements.²¹ Proponents of voter identification requirements claim they are necessary to protect against voter fraud.²² Opponents argue that voter identification laws are unnecessary, and disproportionately disenfranchise African American and Latino voters, who may be less likely to own a qualifying ID.²³

On April 18, 2011 Kansas Governor Sam Brownback signed the Kansas SAFE Act into law.²⁴ Introduced by Kansas Secretary of State Kris Kobach, the Act combines three distinct voter identification requirements: (1) newly-registered Kansas voters must prove U.S. citizenship when registering to vote; (2) voters must show photographic identification when casting a vote in person; and (3) voters must have their signature verified and provide a full Kansas driver’s

¹⁹ *Voting Laws Roundup 2016*

²⁰ Barnes, Robert. *High Court Upholds Indiana Law on Voter ID*. The Washington Post. April 29, 2008. Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/28/AR2008042800968.html> (last accessed August 4, 2016)

²¹ The National Conference of State Legislatures: Voter Identification Requirements | Voter ID Laws. Updated July 27, 2016. Available at: <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (last accessed August 4, 2016). Note: “Strict” ID requirements indicates that voters without acceptable ID must vote on a provisional ballot and take additional steps after election day for their votes to be counted. “Non-strict” identification requirements indicates that voters may cast a ballot and have it counted without additional action on the part of a voter. For example, a voter may sign an affidavit of identity, a poll worker may vouch for the voter’s identity, or election officials may verify the voter’s signature after the close of Election Day.

²² Hancock, Peter. *Kobach Debates Voter ID Laws With KU Law Professor*. Lawrence Journal World, September 10, 2015. Available at: <http://www2.ljworld.com/news/2015/sep/10/kobach-debates-voter-id-laws-ku-law-professor/> (last accessed July 22, 2016)

²³ Childress, Sarah. *Why Voter ID Laws Aren’t Really About Fraud*. FRONTLINE, October 20, 2014. Available at: <http://www.pbs.org/wgbh/frontline/article/why-voter-id-laws-arent-really-about-fraud/> (last accessed July 22, 2016)

²⁴ Press Release: *Kansas Secure and Fair Elections (SAFE) Act Signed by Governor*. Monday April 18, 2011. Office of Kris Kobach, Kansas Secretary of State. Available at: https://www.kssos.org/other/news_releases/PR_2011/PR_2011-04-18_on_SAFE_Act_Signing.pdf (last accessed June 20, 2016)

license or non-driver ID number when voting by mail.²⁵ **Note about suspense voters and provisional ballots.**

Kansas' requirement that voters demonstrate U.S. citizenship in addition to producing photo ID makes Kansas law among the strictest voter identification requirements in the nation. As such, the Kansas SAFE Act has encountered a number of legal challenges since the time of its passage in 2011:

- The National Voter Registration Act²⁶ of 1993 created a standard national system for registering voters in federal elections.²⁷ The uniform federal voter registration form developed by the federal Election Assistance Commission (EAC) requires only attestation of citizenship under penalty of perjury—it does not require any additional documentary proof of citizenship. On June 17, 2013, in a case involving the State of Arizona, the Supreme Court of the United States ruled that states must “accept and use” the uniform voter registration form when registering voters for federal elections.²⁸ In its ruling however, the court left open the possibility that states could establish their own registration requirements, including proof of citizenship, for state and local elections.²⁹
- In November of 2014, the 10th Circuit Court of Appeals ruled that states cannot require citizenship documentation of voters who use the federal form to register, and in June of 2015, the Supreme Court of the United States declined to review the case, upholding the lower court's ruling.³⁰

²⁵ Kobach, Kris. A Guide to Kansas Secure and Fair Elections (SAFE) Act. 2016 Available at: https://www.sos.ks.gov/forms/elections/A_Guide_to_SAFE_Act.pdf (last accessed July 27, 2016) Hereafter cited as *Kobach SAFE Act Guide, 2016*

²⁶ 52 U.S.C. § 20501 - 52 U.S.C. § 20511

²⁷ *About the National Voter Registration Act*, The United States Department of Justice, Civil Rights Division. Updated August 08, 2015. Available at: <https://www.justice.gov/crt/about-national-voter-registration-act> (last accessed August 3, 2016)

²⁸ Supreme Court of The United States. *Arizona ET AL.v. Inter Tribal Council of Arizona, INC. ET AL.* June 17, 2013. Available at: https://www.supremecourt.gov/opinions/12pdf/12-71_7l48.pdf

²⁹ Klukowski, Ken. *SCOTUS: States Can't Require Proof of Citizenship to Vote Using Federal Form*. Breitbart. June 17, 2013. Available at: <http://www.breitbart.com/big-government/2013/06/17/states-can-t-require-proof-of-citizenship-to-vote-supreme-court-says/> (last accessed August 3, 2016)

³⁰ Byrnes, Jesse. *Supreme Court Denies States' Request for Proof of Voter Citizenship*. The Hill. June 29, 2015. Available at <http://thehill.com/blogs/ballot-box/246497-supreme-court-denies-states-request-for-proof-of-voter-citizenship> (last accessed July 29, 2016)

- January 2016, Brian Newby, newly appointed Executive Director of the EAC and a former county elections official in Kansas, approved the requests of Kansas, Alabama, and Georgia to update their voter registration instructions on the federal registration form to include the states' requirement for documentary proof of citizenship.³¹ Though this decision has been widely criticized as outside Newby's authority as Executive Director,³² a majority vote of the Election Assistance Commissioners is required for the EAC to reverse it, and at the time of the writing of this report, the EAC does not have the quorum of Commissioners necessary to conduct such a vote.³³
- On June 29, 2016 United States District Judge Richard Leon denied a request filed by the League of Women Voters and a coalition of other civil rights groups for an injunction to prevent Mr. Newby and the EAC from enforcing the decision to approve Kansas, Alabama, and Georgia's requirement for documentary proof of citizenship on the federal voter registration form.³⁴ On July 18, 2016, the Plaintiffs filed a brief appealing Judge Leon's order in the D.C. Circuit Court.³⁵

Amid continued legal struggles to implement proof of citizenship requirements for voter registration in Kansas, in January 2013, the State began implementing a "bifurcated voting system, in which individuals who register to vote using the federally-approved voter registration form are allowed to vote in federal elections, but not state elections."³⁶ However, on January 15, 2015 Shawnee County District Judge Franklin Theis struck down this bifurcated system, ruling

³¹ Declaration of Brian Dale Newby. Case No. 1:16-cv-00236-RJL. Exhibit 2. February 21, 2016. Available at: <http://www.politico.com/f/?id=00000153-09c8-de04-af73-cfcb7e040001> (last accessed August 3, 2016)

³² Statement by Vice-Chair Thomas Hicks, February 2, 2016. Available at: http://www.eac.gov/assets/1/workflow_staging/Documents/7829.PDF (last accessed August 3, 2016)

³³ President Obama nominated former Nevada Treasurer Kate Marshall to fill the fourth seat necessary to establish a quorum, however her confirmation by the U.S. Senate is considered highly unlikely during the current election year. See: *What's the Matter with Kansas and the National Voter Registration Form?* (Hicks 2016)

³⁴ Brennan Center for Justice at the New York University School of Law. *League of Women Voters v. Newby*. July 28, 2016. Available at: <https://www.brennancenter.org/legal-work/league-women-voters-v-newby> (last accessed August 4, 2016). Hereafter cited as: *League of Women Voters v. Newby*.

³⁵ *League of Women Voters v. Newby*.

³⁶ Johnson, Mark. *Developments in Kansas Election Law and Voting Rights Law*. University of Kansas School of Law. May 19, 2016. p. 04. Available at <https://law.ku.edu/sites/law.ku.edu/files/docs/recent-developments/2016/johnson-materials.pdf> (last accessed August 1, 2016) Hereafter cited as: *Developments in Kansas Election Law*. See also: Santos, Fernanda and Eligon, John. *2 States Plan 2-Tier System for Balloting*. October 11, 2013. *The New York Times*. Available at: http://www.nytimes.com/2013/10/12/us/2-states-plan-2-tier-system-for-balloting.html?pagewanted=1&_r=2 (last accessed August 1, 2016)

that “a person is either registered to vote or he or she is not. By current Kansas law, registration, hence the right to vote, is not tied to the method of registration.”³⁷ This ruling is widely expected to be appealed.³⁸ Secretary of State Kris Kobach said, “We don’t anticipate this decision is going to be the final word on the subject.”³⁹ Indeed, despite Judge Theis’ 2015 ruling, on July 12, 2016 Secretary Kobach received administrative approval to enact K.A.R. 7-23-16, “a temporary regulation that seeks to formalize his two-tiered voter registration system.”⁴⁰

In May of 2016, U.S. District Judge Julie Robinson ruled that the Kansas “proof-of-citizenship requirement violates a provision of the National Voter Registration Act that requires ‘only the minimum amount of information’ to determine a voter’s eligibility,” and thus cannot be enforced.⁴¹ In her decision, Robinson wrote that “even if instances of non-citizens voting cause indirect voter disenfranchisement by diluting the votes of citizens, such instances pale in comparison to the number of qualified citizens who have been disenfranchised by this law.”⁴² Unless reversed by a higher court, this decision is to affect voters who register using either the Kansas registration form, or the federal voter registration form. While the legal battle regarding Kansas’ voter identification and citizenship verifications requirements remains ongoing; through this project the Committee sought to gather direct testimonial evidence, and to document the concerns and experiences of Kansas voters in exercising their fundamental right to freely elect their leaders.

³⁷ Eveld, Edward. *Judge Rules Kris Kobach Can’t Operate Two-Tier Election System in Kansas*. The Kansas City Star. January 15, 2016. Available at: <http://www.kansascity.com/news/politics-government/article54933870.html> (last accessed August 3, 2016) Hereafter cited as: *Judge Rules Kris Kobach Can’t Operate Two-Tier Election System in Kansas*.

³⁸ *Belenky v. Jones*, Case No. 2013-cv-1331 (District Court of Shawnee County, January 15, 2016). See also: *Developments in Kansas Election Law*, p.4.

³⁹ *Judge Rules Kris Kobach Can’t Operate Two-Tier Election System in Kansas*

⁴⁰ Kan. Admin. Regs. § 7-23-16 (temporary) See also: Hicks, Carmen. *What’s the Matter with Kansas and the National Voter Registration Form?* Harvard Journal on Legislation. Vol. 53, No. 2. July 26, 2016. Available at <http://harvardjol.com/2016/07/26/whats-the-matter-with-kansas-and-the-national-voter-registration-form/>. (Last accessed August 3, 2016) Hereafter cited as: *What’s the Matter with Kansas and the National Voter Registration Form?*(Hicks 2016)

⁴¹ Wagner, Lisa. *Judge Blocks Kansas’ Proof-Of-Citizenship Voting Registration Requirement*. NPR America. May 18, 2016. Available at: <http://www.npr.org/sections/thetwo-way/2016/05/18/478496140/judge-blocks-kansas-proof-of-citizenship-voting-registration-requirement>

⁴² Laura Wagner, “Judge Blocks Kansas’ Proof-Of-Citizenship Voting Registration Requirement.” National Public Radio, the two-way, May 18, 2016, <http://www.npr.org/sections/thetwo-way/2016/05/18/478496140/judge-blocks-kansas-proof-of-citizenship-voting-registration-requirement> (Last accessed Dec. 8, 2016).

IV. SUMMARY OF PANEL TESTIMONY

The panel discussion on January 28, 2016 at the Topeka and Shawnee Public Library in Topeka, Kansas included testimony from diverse academic experts and legal professionals; community advocates; state elected officials; and individual community members directly impacted by voting requirements imposed under the Kansas SAFE Act.⁴³ At the direction of the Committee's bipartisan members, panelists were selected to provide a diverse and balanced overview of the civil rights issues impacting voters in Kansas. Testimony included the perspective of both proponents and opponents of the Kansas SAFE Act, including that of Kansas Secretary of State Kris Kobach, the legislation's author. Despite an active search and many outreach attempts however, the Committee was unable to identify any Kansas-based community organizations or community groups in support of the SAFE Act. True the Vote, a "nonpartisan voters' rights and election integrity organization,"⁴⁴ was able to send a representative from their Texas office to speak about the importance of preserving election integrity more broadly. No local community organizations in Kansas were identified to speak in support of Kansas' voting requirements, and no individuals in support of these requirements presented themselves to speak during the period of public comment. Regrettably, this lack of participation from community representatives in support of Kansas' voting requirements prevented the Committee from obtaining the full range of intended perspectives.

The Committee notes that where appropriate, all invited parties who were unable to attend personally were offered the opportunity to send a delegate; or, at a minimum, to submit a written statement offering their perspective on the civil rights concerns in question. The Committee did receive a number of written statements from the public offering supplemental information on the topic, which are included in **Appendix B**. It is in this context the Committee submits the findings and recommendations following in this report.

A. Voter Identification and Proof of Citizenship

Under the Kansas SAFE Act, Voters may obtain a free, non-driver photo ID from the Kansas Division of Vehicles,⁴⁵ and a free, certified copy of an individual's birth certificate from the Kansas Office of Vital Statistics, to serve as proof of citizenship⁴⁶ after swearing under penalty

⁴³ The complete agenda and minutes from this meeting can be found in **Appendix B**

⁴⁴ True the Vote: <https://truethevote.org/aboutus> (last accessed July 29, 2016)

⁴⁵ *got voter ID? Photographic Identification*

⁴⁶ *got voter ID? Voter Registration (No Citizenship Documents)*

of perjury that the documentation is for voting purposes only. Despite these accommodations, throughout the testimony, the Committee heard numerous concerns regarding reasons why legitimate voters may be disenfranchised by these documentation requirements. Such reasons include: (1) inconsistencies in implementation and training; (2) insufficient voter education efforts; (3) the level of burden for citizens to obtain required documentation; and (4) a lack of provision for those born out of state to obtain free documentation.

1. Implementation Training and Consistency

Testimony throughout the Committee’s hearing yielded three primary concerns regarding inconsistencies in implementation which may disenfranchise eligible voters under the SAFE Act. The first is the erroneous assessment of fees for required documentation. Disability rights advocate Mr. Michael Byington testified, “I’ve worked with a number of people trying to get the [Kansas] birth certificate, and in almost all cases they have attempted to charge them.”⁴⁷ He recalled one specific situation, when he accompanied a client who was both visually and hearing impaired to the Indiana Bureau of Motor Vehicles (BMV). His client had traveled to the BMV in order to obtain a photo ID for voting purposes. Although his client explained to the BMV staff that the ID was for voting purposes, the staff attempted to charge her \$17 for the service. When Mr. Byington reminded the staff person of the SAFE Act provision allowing for free photo identification for voting purposes, the staff reportedly replied, “I think I heard something about that law. And there’s probably some form...but I wouldn’t have the foggiest idea of where it is. That will be \$17.”⁴⁸ Mr. Byington testified that he and his client insisted on waiting until the clerk was able to locate the appropriate form. Mr. Byington reported, “About an hour later my client walked out of that booth and out of that office with her ID and she hadn’t had to pay for it. But had I not been there with the knowledge that I had of the laws, she would have definitely been charged the \$17.”

In such situations, panelists argued that any fees incurred for retrieving required voter identification may effectively stand as a poll tax, which is unconstitutional under both the 14th and the 24th Amendments to the U.S. Constitution.⁴⁹ Mr. Byington concluded, “that is very clearly the way in this country, we have for many years defined a poll tax and a poll tax is not

⁴⁷ Byington Testimony. *Transcript*, p. 120 line 20 – p. 121 line 23

⁴⁸ Byington Testimony. *Transcript*, p. 261 line 02 – p. 264 line 05

⁴⁹ U.S. Constitution, Amendment XIV, guarantees all people “equal protection of the laws.” Available at Cornell University School of Law, Legal Information Institute: <https://www.law.cornell.edu/constitution/amendmentxiv> (last accessed September 14, 2016); U.S. Constitution, Amendment XXIV prohibits the establishment of poll taxes directly. Available at: <https://www.law.cornell.edu/constitution/amendmentxxiv>. See also: Byington Testimony, *Transcript*, p. 263 line 08 – p. 264 line 17; Davis Testimony. *Transcript*, p. 131 lines 07-12

constitutional, it's not legal, and it's not patriotic.”⁵⁰ Panelist Richard Levy, Distinguished Professor of Constitutional Law at the University of Kansas School of Law emphasized that even small fees associated with voting may raise related constitutional concerns. Referencing the U.S. Supreme Court decision in *Harper v. Virginia Board of Elections* (1966), he noted that the cost of a poll tax is irrelevant to the discussion; “The Court just said paying a tax is not correlated to your qualifications to vote, period.”⁵¹ In delivering the 1966 majority opinion on *Harper v. Virginia Board of Elections*, Justice William O. Douglas said, “We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”⁵²

Other concerns regarding improper training and implementation include poll workers erroneously rejecting voter identification that is in fact valid under the SAFE Act. Panelist Carrie O'Toole of the Potawatomi Tribal Council testified that she had been denied the right to use her tribal ID as acceptable identification when voting. “It happened by chance that the election officer was sick and missed her training,” Ms. O'Toole explained. So when she presented her tribal identification card to vote, the election officer asked for a driver's license instead. When Ms. O'Toole informed the election officer that a tribal ID is an approved form of government-issued identification under the Kansas SAFE Act, “she didn't know anything about it. So it was very frustrating and I was so flustered and in shock that I forgot to ask for a provisional ballot to vote.”⁵³ During her testimony, Ms. O'Toole also noted that on the same day she was denied the right to use her tribal ID to vote, she observed an election official also deny a military veteran the right to use his military ID to vote.⁵⁴ Ms. O'Toole now volunteers at the polls to help ensure that such errors are not repeated. “We have worked very hard to get people to do the Native vote...I feel it's been very important for my elders and my community members that [they] take the time to be involved in this process.”⁵⁵

⁵⁰ Byington Testimony. *Transcript*, p. 261 line 02 – p. 264 line 05

⁵¹ Levy Testimony. *Transcript*, p. 50 line 20 – p. 51 line 10

⁵² *Harper v. Virginia Board of Elections* (1966) No. 48. Decided March 24, 1966. Available at FindLaw: <http://caselaw.findlaw.com/us-supreme-court/383/663.html> (last accessed September 15, 2016)

⁵³ O'Toole Testimony. *Transcript*, p. 79 line 24 – p. 80 line 17

⁵⁴ O'Toole Testimony. *Transcript*, p. 80 line 18 – p. 81 line 04

⁵⁵ O'Toole Testimony. *Transcript*, p. 82 line 16 – p. 83 line 22

Similarly, former State Representative Ann Mah described a number of other situations in which poll workers erroneously rejected voter identification that should have been accepted.⁵⁶

1. During the 2012 elections, voter ID's were reportedly rejected at multiple polling locations in Wichita, because the address on the ID did not match the voting address.
2. A voter attempted to vote using her temporary (paper) driver's license, along with her old driver's license as ID. The poll worker would not accept her temporary license, so she was forced to vote on a provisional ballot. Because her permanent license did not arrive before the canvas date, her vote was thrown out.
3. A voter was told to vote using a provisional ballot because the poll worker would not accept his suspended driver's license (which he still possessed) as valid identification.
4. Poll workers rejected a veteran's Department of Veteran Affairs service card because it had no address on it.
5. Poll workers rejected a Wichita State University ID as acceptable voter identification.

In her written testimony submitted to the Committee on the topic, she asserted that under the SAFE Act, each of these individuals identified *should* have been permitted to vote with the presented identification.⁵⁷ However, due to poor training and inconsistent implementation, their votes were not counted.

Finally, the Committee heard testimony that proof of citizenship documentation is sometimes lost in the voter registration data transfer between the Department of Motor Vehicles (DMV) and county elections officials. Douglass County Clerk Jamie Shew testified that in 2014, his county implemented an outreach program to contact voters who were in suspense due to a lack of documentation.⁵⁸ As the election drew nearer, county staff made personal phone calls to such voters, in an effort to get them to complete their registration. Mr. Shew testified, "The majority of the applicants, almost 60 percent, had registered through the DMV. They had presented their documentation, and somewhere it didn't show up to our office, and when we called them they were frustrated because -- they're like, 'I've already done this. Why am I doing this a second time?'"⁵⁹ Mr. Shew lamented that due to such frustration, many voters gave up and are deterred

⁵⁶ Mah Written Testimony, pp. 03-06 (Appendix x)

⁵⁷ Mah Written Testimony, pp. 03-06 (Appendix x)

⁵⁸ Shew Testimony. *Transcript*, p. 169 lines 11-24

⁵⁹ Shew Testimony. *Transcript*, p. 169 lines 11-24

from voting all together—a concern that may disproportionately impact young voters.⁶⁰ He said, “We also know that administrative challenges are the largest impediment to the participation of younger voters. In 2014 we found out the largest group of voters in suspense were 18 to 24 years of age, and they are also the quickest to say ‘Forget it. I’ve got stuff going on.’”⁶¹

2. Voter Education

In addition to the importance of properly training election officials and state service employees, the Committee heard testimony about the need to educate the voting public on the SAFE Act’s new requirements. Referring to the Supreme Court Case *Crawford v. Marion County Election Board*, former Kansas Representative Ann Mah noted that “voter education was a critical issue in approving the voter ID law in Indiana.”⁶² She asserted that other states instituting new voter ID requirements, such as Indiana, Georgia, and Missouri, spent millions of dollars educating voters on their new requirements. She wrote, “Missouri, for example, spent \$13 million over the first few years of the law.”⁶³ In contrast, following the passage of the SAFE Act, Kansas reportedly budgeted \$60,000 in 2012 and only \$200,000 in 2013 for voter education.⁶⁴ As a member of the Kansas legislature during the passage of the SAFE Act, Representative Mah recalled:

I asked for a copy of the Secretary’s voter education plan for voter ID. During the hearings he said that they would rely primarily on free media and legislators to inform individuals of the changes. Other states have had to use broader media and not just low-volume radio stations. This was a real weak spot in the plan. It took Georgia years to meet the court’s concerns. Kansas’ education plan was minimal. A case in point. Wichita had a ballot initiative in early 2012. The Secretary of State started the public ads just two weeks prior to the vote. There is no way someone born out of state or without an ID could comply in time to vote. Later I learned that 45 ballots were rejected for no ID.⁶⁵

Other panelists also highlighted the need for increased voter education support, noting the efforts of nonprofits and advocacy groups to fill in where the state’s efforts to educate voters have fallen short. Dr. Glenda Overstreet of the Kansas NAACP testified that despite her long standing commitment to voting, in the previous election she found out nearly sixty days after the election was over that her advanced ballot was not counted.⁶⁶ She said, “I then stayed resolved to the fact

⁶⁰ Shew Testimony. *Transcript*, p. 169 lines 11-24

⁶¹ Shew Testimony. *Transcript*, p. 169 line 25 – p. 170 line 06

⁶² Mah Written Testimony p.02 (Appendix x)

⁶³ Mah Written Testimony p.02 (Appendix x)

⁶⁴ Mah Written Testimony p.02 (Appendix x)

⁶⁵ Mah Written Testimony p.02 (Appendix x)

⁶⁶ Overstreet Testimony. *Transcript*, p. 86 lines 04-19

that we constantly have to continue to keep our membership educated on the changing laws,” a commitment that the NAACP in Kansas has taken on.⁶⁷ She continued, “It’s part of an education process that we have to get out to combat some of these requirements that we’re seeing that prove to be cumbersome.”⁶⁸

3. *Level of Burden*

While reasonable burdens on voting were deemed constitutional under *Crawford v. Marion County Election Board*, in his testimony, Panelist Richard Levy, Distinguished Professor of Constitutional Law at the University of Kansas School of Law noted that the ruling was in response to a facial challenge—meaning it applied to Indiana’s voter identification law broadly, without regard to how it had been applied.⁶⁹ Professor Levy explained that the burden to establish in order to win a facial challenge in court is especially high, “and the Court emphasized that in *Crawford*.”⁷⁰ As such, he testified that an “as applied” challenge may demonstrate a different outcome, “particularly for those voters it’s especially difficult to meet the photo ID requirement.”⁷¹ Specifically, Levy recalled that “the Indiana law contained a lot of alternative ways of identifying yourself and proving who you were that not all of which required that you actually have a photo ID...for example, you can submit...a utility bill with your name and address on it...part of the Court’s reasoning was it was so easy to prove who you were under Indiana law that it couldn’t really be a burden.”⁷²

However, Kansas voter ID requirements under the SAFE Act are significantly more rigorous than the Indiana requirements reviewed under *Crawford*. In Kansas, voter identification must be government-issued, contain a photograph, and must not be expired.⁷³ The requirement that individuals provide documentary proof of citizenship upon registration adds an additional burden on would-be voters. As Professor Levy testified, “proving citizenship is more difficult than

⁶⁷ Overstreet Testimony. *Transcript*, p. 86 line 20 – p. 87 line 06; p. 99 line 15 – p. 100 line 08; p. 104 line 17 – p. 105 line 21

⁶⁸ Overstreet Testimony. *Transcript*, p. 99 line 15 – p. 100 line 08

⁶⁹ Levy Testimony. *Transcript*, p. 22 line 21 – p. 23 line 24

⁷⁰ Levy Testimony. *Transcript*, p. 22 line 21 – p. 23 line 24

⁷¹ Levy Testimony. *Transcript*, p. 22 line 21 – p. 23 line 24

⁷² Levy Testimony. *Transcript*, p. 51 line 18 – p. 52 line 11

⁷³ Some exceptions apply. For example, persons over age 65 may use an expired identification. For complete list of acceptable photographic identification, see: *got voter ID? Valid Forms of Photographic Identification*. Kansas Secretary of State, Election Division. 2012. Available at: <http://www.gotvoterid.com/valid-photo-ids.html#idlist> (last accessed August 18, 2016) [*Hereafter cited as: got voter ID? Photographic Identification*]

getting a photo ID, so the burdens are arguably more severe.”⁷⁴ Therefore, he suggested that in particular “the proof of citizenship requirement for voter registration in the Kansas SAFE Act is more vulnerable to a Constitutional challenge under *Crawford*.”⁷⁵ In concurrence with this testimony, attorney Mark Johnson noted that The Federal Election Assistance Commission denied the State’s efforts to add the proof of citizenship requirements to the federal voter registration form, citing this as evidence that the federal government may find this requirement overly burdensome.⁷⁶

Indeed, several panelists highlighted the individual burden the SAFE Act requirements impose on voters. For example, Douglass County Clerk Jamie Shew testified that in order to meet eligibility requirements for state elections, his office found “it can take up to two months to get your birth certificate.”⁷⁷ Furthermore, former State Representative Anne Mah explained that because Kansas is a rural state, many would-be voters may have to travel great distances to counties where IDs can be acquired.⁷⁸ She noted that only 33 counties had DMV locations where citizens could obtain IDs to vote, leaving 70 counties without the capacity to provide voter IDs.⁷⁹ Marge Ahrens of the League of Women Voters commented that “it takes little to drive away those who have limited power already.”⁸⁰ Mr. Shew recalled that that in 2014 he spoke to a 90 year old woman with no proof of birth because she was born at home. Her response to the enhanced requirements was, “I don’t have the energy for all that. I guess I voted most of my lifetime. I’m done.”⁸¹ Mr. Shew testified that the complexity of the forms and requirements is a deterrent for Kansas citizens who have been “confused by the process,”⁸² especially for those citizens with low literacy levels.⁸³

In addition to the burden on individuals, testimony indicated that voter registration requirements under the SAFE Act have also created a substantial burden on community groups and local

⁷⁴ Levy Testimony, *Transcript*, p. 23 lines 20-22

⁷⁵ Levy Testimony, *Transcript*, p. 23 lines 16-19

⁷⁶ Johnson Testimony, *Transcript*, p. 160 lines 01-04

⁷⁷ Shew Testimony, *Transcript*, p. 168 line 17-p. 169 line 10

⁷⁸ Mah Written Testimony, p. 9 (Appendix x)

⁷⁹ Mah Written Testimony, p. 10 (Appendix x)

⁸⁰ Ahrens Testimony, *Transcript*, p. 142 lines 01-08

⁸¹ Shew Testimony, *Transcript*, p. 170 line 17-p. 171 line 02

⁸² Shew Testimony, *Transcript*, p. 170 lines 07-16

⁸³ Shew Testimony, *Transcript*, p. 168 lines 17-23

elections agencies.⁸⁴ Civic organizations and local election agencies have reportedly struggled to support citizens working to satisfy voter registration requirements. Marge Ahrens testified that despite the many years of experience The League of Women Voters has in conducting voter registration outreach, the effectiveness of their efforts has declined significantly.⁸⁵ She noted,

Prior to implementation of the SAFE Act the League of Women Voters of Kansas and in nine communities registered voters at events which particularly targeted the underrepresented, schools, community organizations, churches. We frequently were registering people in public venues such as public libraries. And since that time there is a major shift, and I know this from the first-hand reports of the League presidents and voter service chairs across the state of Kansas.⁸⁶

Ms. Ahrens described the difficulty of registering voters at such public events in the wake of the SAFE Act, because the process now requires documentation most people do not have on hand, and some do not have easily accessible.⁸⁷ She lamented that such events “are going to become less and less frequent because they're not any of any benefit. People really cannot register at these tables.”⁸⁸ She concluded, “We maintain that all government processes need to be accessible and understandable. And now we believe that the complexity and confusion of the laws have created so much uncertainty that the registrant is in fact threatened.”⁸⁹

Cille King of the League of Women Voters, also spoke to this phenomenon. Ms. King claimed that while working on an initiative to reach out to voters on the suspense list found that a few people “said that they no longer wanted to vote.”⁹⁰ She documents the “great deal of volunteer time” devoted to help citizens finish their registration lamenting that “getting citizens registered to vote should not be harder than getting them informed.”⁹¹

County elections officials have also faced significant burdens in order to assure that all eligible voters are able to register. Mr. Shew specified that Douglas Country spent more than \$30,000 on outreach and assistance to people working to satisfy voter requirements under the SAFE Act.⁹²

⁸⁴ King Testimony, p. 123-125; Hammet Testimony, p. 127-128; Davis Testimony, p. 130-132; Ahrens Testimony, p. 142-143; Shew Testimony, p. 166, p. 173

⁸⁵ Ahrens Testimony. *Transcript*, p. 135 line 09 – p. 138 line 24

⁸⁶ Ahrens Testimony. *Transcript*, p. 138 lines 08-19

⁸⁷ Ahrens Testimony. *Transcript*, p. 136 line 16 – p. 138 line 18

⁸⁸ Ahrens Testimony. *Transcript*, p. 141 lines 04-07

⁸⁹ Ahrens Testimony. *Transcript*, p. 138 lines 19-24

⁹⁰ King Written Testimony, p.6 (Appendix x)

⁹¹ King Written Testimony, p.6 (Appendix x)

⁹² Shew Testimony, *Transcript*, p.173 lines 09-13

Ms. Ahrens testified that 105 counties have tried to help citizens with incomplete registrations, at a cost of approximately \$5 per attempt.⁹³ Many smaller and rural counties may not be able to afford such expenses.

In his testimony, Secretary Kris Kobach dismissed concerns regarding the SAFE Act's increased documentation burden on voters. He stated, "The photo ID part, I don't think it's a burden to reach into one's wallet or one's purse and pull out a photo ID. Someone could argue that you're exerting calories when you're doing that go, and there is some process. I don't think that's a burden."⁹⁴ With respect to the additional requirement of proving citizenship upon registration, Kobach said, "Is this step a burden? I guess it depends on how you define burden. Someone might say that it is to find your birth certificate or your passport and take a picture of it with your phones and email it in or send it in or carry it in. I don't think it's significant."⁹⁵ Kansas Representative Jim Ward challenged this assertion, citing the 40,000 citizens on the suspended voter list due to lack of documentary proof of citizenship. "It is a burden for these voters for the ID part. And 40,000 people in Kansas would definitely disagree with the Secretary and say that this is a burden for them to participate."⁹⁶ Even if many Kansas citizens are able to produce their documents with relative ease, testimony before the Committee overwhelmingly indicated that at least some groups may face a substantial burden in obtaining the documentation required under the SAFE Act.

4. Voters Not Born in Kansas

Despite provisions in the SAFE Act allowing for free identification documents for voting purposes, the Committee heard testimony that some individuals may actually incur a cost in order to obtain the required documentation. For example, a number of panelists pointed out that the SAFE Act provides only Kansas birth certificates for free.⁹⁷ Voters who were not born in Kansas must pay the applicable fee in the state of their birth in order to secure a certified copy of their birth certificate. Ms. Cheyenne Davis, Field and Political Director for the Kansas Democratic Party, testified, "For some people who have lived out of state or were born out of state and they do not have their birth certificate, the cost of that is equitable to a poll tax."⁹⁸ Douglass County Clerk Jamie Shew testified that his office contacted the appropriate agency in

⁹³ Ahrens Testimony, *Transcript*, p. 142 line 24- p. 143 line 02

⁹⁴ Kobach Testimony, *Transcript*, p. 234 lines 16-21

⁹⁵ Kobach Testimony, *Transcript*, p. 235 lines 01-20

⁹⁶ Ward Testimony, *Transcript*, p. 236 line 21- p. 237 line 06

⁹⁷ Shew Testimony, *Transcript*, p. 167 line 04 – p. 168 line 16; Byington Testimony. *Transcript*, p. 121 lines 08-23

⁹⁸ Davis Testimony. *Transcript*, p. 131 lines 07-12

each state in order to inquire as to such costs. Their inquiry revealed fees ranging from \$7 to \$45, with an average cost of \$20.⁹⁹

In addition to the potential for the SAFE Act's proof of citizenship requirement to stand as a poll tax for Kansans born out of state, Mr. Shew noted broader concern regarding equal protection. He noted that under the Act, "one group of citizens...gets something that other groups of citizens do not have."¹⁰⁰ Citing the Help America Vote Act (HAVA), he testified that "each person should have equal, fair access just like any other voter regardless of your circumstances."¹⁰¹ He concluded, "if one group of citizens gets a free birth certificate, all citizens should get a free birth certificate."¹⁰² Accordingly, Mr. Shew noted that as of 2014, his county began paying for birth certificates for any resident born out of state who needed the documentation for voting purposes.¹⁰³ Similarly, panelist Marge Ahrens of the League of Women Voters testified that her organization had also purchased out of state birth certificates for Kansans who could not afford them, in order to help them complete their registration.¹⁰⁴ Mr. Shew cautioned however, that such initiatives vary by county, and many counties do not have the resources to provide this type of support.¹⁰⁵

B. Voter Participation

Throughout the hearing, the Committee received testimony from a number of panelists citing concern that the challenges described above have already resulted in an actual decline in rates of voter participation and voter registration in Kansas since the passage of the SAFE Act. Panelist Doug Bonney of the Kansas Chapter of the American Civil Liberties Union (ACLU) testified that "there is at least preliminary evidence that after Kansas' strict photo ID requirement took effect on January 1, 2012, voter participation in Kansas dropped significantly."¹⁰⁶ The Committee notes that in September of 2014, the United States Government Accountability Office (GAO) released a report entitled "Elections: Issues Related to State Voter Identification

⁹⁹ Shew Testimony, *Transcript*, p. 167 lines 04-18

¹⁰⁰ Shew Testimony, *Transcript*, p. 167 line 19 – p. 168 line 02

¹⁰¹ Shew Testimony, *Transcript*, p. 168 lines 03-16

¹⁰² Shew Testimony, *Transcript*, p. 168 lines 03-16

¹⁰³ Shew Testimony, *Transcript*, p. 167 lines 19-24

¹⁰⁴ Ahrens Testimony, *Transcript*, p. 142 lines 18-23

¹⁰⁵ Shew Testimony, *Transcript*, p. 185 lines 01-10

¹⁰⁶ Bonney Testimony, *Transcript* p. 67 lines 17-20

Laws.”¹⁰⁷ In it, the GAO reported results of an analysis it did of voter turnout in Kansas and Tennessee. The analysis concluded that voter turnout had indeed decreased in Kansas between the 2008 and the 2012 general elections to a greater extent than turnout decreased in selected comparison states, and that the decrease was attributable to changes in the state’s voter ID requirements.¹⁰⁸ The GAO also found race and age disparities in the demographics of those affected: turnout was reduced by larger numbers among African Americans and young voters between the ages of 18 and 23 than other groups during this time period.¹⁰⁹ Proponents of the SAFE Act suggest that enthusiasm for the 2008 national election was greater than in the 2012 election, attributing diminished voter turnout to factors unrelated to the SAFE Act.¹¹⁰

1. Voter Turnout

In written testimony submitted to the Committee, Nathaniel Birkhead, Assistant Professor of Political Science at Kansas State University, explained the link between strict voter identification requirements and depressed voter participation:

In political science, the most common way to understand voter turnout is to focus on the costs of voting (things that make it harder to vote) and the benefits of voting (things that voters expect to receive if their preferred candidate wins). One of the most consistent findings in political science research is that turnout drops when the costs of voting go up, and that turnout goes up with the costs of voting go down.¹¹¹

Professor Birkhead wrote:

While no research has looked at Kansas’ voter ID laws specifically, the consensus in scholarly research is that voter ID laws present a substantial cost to voting, and as such depress turnout. In particular, the costs associated with voter ID laws tend to have disproportionate impact among the poor, uneducated, and young...the ultimate impact...is to make the electorate unrepresentative of the state’s citizens.¹¹²

Professor Birkhead went on to note that “Kansas’ voter registration and voter ID laws are among the most demanding in the country.”¹¹³ Although as of the time of his writing, no empirical studies had been conducted to specifically assess at the impact of Kansas’ voter identification

¹⁰⁷ U.S. Government Accountability Office. Elections: Issues Related to State Voter Identification Laws [Reissued on February 27, 2015]. Available at <http://www.gao.gov/products/GAO-14-634>. (last accessed July 27, 2016). Hereafter cited as: *GAO Elections: Issues Related to State Voter Identification Laws, 2015*

¹⁰⁸ Citation. Note: the Kansas S.A.F.E. Act was enacted in April of 2011

¹⁰⁹ Citation

¹¹⁰ Fitzgerald Testimony, *Transcript* p. 196 lines 01-09

¹¹¹ Birkhead Written Testimony, p. 1, lines 28-32 (Appendix x)

¹¹² Birkhead Written Testimony, p. 1, lines 10-15 (Appendix x)

¹¹³ Birkhead Written Testimony, p. 2 line 27 – p. 3 line 02 (Appendix x)

requirements on voter turnout in the state, Professor Birkhead referenced an empirical study that had been conducted of Georgia's voter identification requirements, which he noted are "similar to Kansas both in the requirement that voters are able to furnish a photo ID, and similar in what forms of photo IDs are valid."¹¹⁴ This analysis found "the Georgia voter ID statute had a suppressive effect among those lacking IDs: there was an across the board drop in turnout of 6.5% among those without IDs"¹¹⁵ In other words, "about 24,692 registered voters in Georgia were turned away due to the photo ID statute that is similar to Kansas"¹¹⁶ In reviewing such empirical research, the Committee notes that in addition to imposing voter photo identification requirements similar to Georgia, the Kansas SAFE Act also requires that voters show proof of citizenship upon registration. This additional requirement is unique to just two states in the country (Kansas and Arizona) and its impact has not yet been empirically studied. In response to these concerns, Senator Faust-Goudeau spoke about her efforts to introduce legislation to increase voter participation and the political apathy and opposition she has faced from Secretary Kobach.¹¹⁷

2. *Suspense Voters*

In addition to the potential direct impact on rates of voter participation and voter registration, the Committee heard concern that many citizens in Kansas who *have* turned out to vote in recent elections have not had their votes counted. Attorney Mark Johnson explained that under the SAFE Act, voters who register without proof of citizenship are placed on a "suspense voter" list, and must prove their citizenship within 90 days or be purged from the list and required to restart the voter registration process.¹¹⁸ Secretary Kobach testified that most people on the suspense list never finished registering simply because they had moved, and that purging the list is a necessary way to decrease cost from sending those people reminders.¹¹⁹ Similarly, panelist Catherine Engelbrecht of True the Vote, suggested that the 90-day rule for purging the suspended voters

¹¹⁴ Birkhead Written Testimony, p. 4, lines 16-24 (Appendix x) *See also*: Hood, MV III, and Charles S. Bullock III. 2012. "Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute." *State Politics and Policy Quarterly* 12(4):394-14.

¹¹⁵ Birkhead Written Testimony, p. 4, line 31 – p. 5 line 05 (Appendix x)

¹¹⁶ Birkhead Written Testimony, p. 4, line 31 – p. 5 line 05 (Appendix x)

¹¹⁷ Faust-Goudeau Testimony, *Transcript* p. 223 line 20- p. 228 line 20

¹¹⁸ Johnson Testimony, *Transcript* p. 150 line 20- p. 161 line 01

¹¹⁹ Kobach Testimony, *Transcript* p. 233 lines 03-16

list is a valuable step in encouraging voters to fix registration in a timely manner and that it “bolsters confidence” in “election integrity.”¹²⁰

However, Mr. Bonney of the ACLU raised concern regarding the large number of people on Kansas’ suspense voter list. He noted that by September 2015, there were 37,000 voters on the suspense list.¹²¹ Of those, “almost 32,600 were on the suspense list because they had not provided or because bureaucrats could not find documentary proof of citizens for the voter registrants.”¹²² Mr. Bonney testified that those 32,600 people “equal 2 percent of all the registered voters in Kansas...When a law causes 2 percent of voter...registrants to go into suspense, that law is having a direct and damaging effect on voter participation in the state...”¹²³ Mr. Bonney also noted a disparate impact on the basis of both political affiliation and age, with 58% of those on the suspense voter list due to a lack of citizenship documentation being politically “unaffiliated” and 40 percent being under age of 30.¹²⁴

1. Provisional Voting

Under the SAFE Act, voters on the suspense voter list due to incomplete documentation or those without approved photo ID at the polls may vote using a provisional ballot, and submit their missing documentation at a later time, in order to have their votes counted.¹²⁵ In a written statement to the Committee, former State Representative Ann Mah noted that before the 2012 election, the Shawnee County Election Commission would provide a list of the names of citizens who voted with provisional ballots because they were lacking photo identification. Representative Mah would then contact these voters to advise them about how to meet eligibility requirements and ensure their votes were counted. After the 2012 general election, Representative Mah requested these same lists. She testified:

When [Secretary] Kobach found out, he made me go to the district court to get the list. When the district court ordered him to give me the list, he went to federal court to try and stop me. When the federal judge ordered him to give me the list, Kobach got a law passed to stop any future requests of the names of those

¹²⁰ Engelbrecht Testimony, *Transcript* p. 152 line 16- p. 153 line 08

¹²¹ Bonney Testimony, *Transcript* p. 68 lines 06-11

¹²² Bonney Testimony, *Transcript* p. 68 lines 06-11

¹²³ Bonney Testimony, *Transcript* p. 69 lines 10-18

¹²⁴ Bonney Testimony, *Transcript* p. 68 lines 20-25; *See also*: Smith Testimony, *Transcript*, p. 31 lines 19-21 & p. 32 lines 18-19

¹²⁵ cite

who voted provisional ballots. Now no one can help those who vote provisional ballots understand what has happened and how to make their votes count.¹²⁶

Marge Ahrens of the League of Women Voters raised additional concern regarding the use of provisional ballots. She noted that voting with a provisional ballot poses another threat to voter participation because provisional ballots are not confidential and can be read by poll workers.¹²⁷ “It completes the breach of trust between a democratic government and all of its citizens around the most essential signature of a democracy, the right to vote and to the privacy of that vote for all.”¹²⁸ She argued that this breach of privacy “means a great deal when you live in a small community.”¹²⁹

Overall, testimony before the Committee indicated that although no empirical research exists to evaluate the impact of the SAFE Act on voter turnout in Kansas, preliminary data in the state as well as comparison empirical research in other states indicate that that stricter voter identification requirements result in lower voter turnout—and Kansas’ voter ID requirements under the SAFE Act are among the strictest in the nation. Furthermore, a lack of access to suspense voter lists, and the purging of those lists after 90 days, may make it more difficult for county officials to assist voters in completing the requisite documentation. Finally, privacy concerns relating to the required use of a provisional ballot may additionally deter eligible voters from participating. Further study in each of these areas is necessary to ensure the rights of all eligible Kansas citizens to vote, and to have their vote counted.

C. Civil Rights and Disparate Impact

As a Federal Advisory Committee focused specifically on matters of civil rights, throughout the hearing the Committee took particular note of concerns panelists raised regarding evidence of both *discriminatory intent* and *disparate impact*. Constitutional Law Professor Richard Levy of the University of Kansas School of Law explained that “Because the S.A.F.E. Act’s requirements are facially neutral as to race or national origin, it will be treated as discriminatory for constitutional purposes only if there is proof of discriminatory intent, which may be proved by a stark pattern of disparate impact or by the circumstances surrounding the adoption of the act.”¹³⁰ Professor Levy also noted, however, that Section 2 of the Voting Rights Act (VRA) goes beyond

¹²⁶ Mah Written Testimony, p. 14 (Appendix x)

¹²⁷ Ahrens Testimony, *Transcript* p. 141 lines 17-24

¹²⁸ Ahrens Testimony, *Transcript* p. 143 lines 10-15

¹²⁹ Ahrens Testimony *Transcript* p. 141 lines 22-24

¹³⁰ Levy Written Testimony, pp. 06-07 (Appendix x)

these constitutional protections in that it “prohibits state laws or requirements that *result* in discrimination without regard to *intent* or *purpose*.”¹³¹ The Committee heard testimony which raised concern regarding both potential discriminatory intent and disparate impact in relation to the SAFE Act, each discussed below.

1. Improper Intent

In his testimony, Professor Levy emphasized that constitutional challenges based on discriminatory intent are often difficult to demonstrate, because contemporary policymakers are unlikely to openly declare discriminatory intent while writing, introducing, or discussing new laws or regulations.¹³² However, Professor Levy went on to explain that under some circumstances, procedural irregularities can be considered evidence of discriminatory intent.¹³³ In this light, the Committee notes that Secretary Kobach is the only Secretary of State in the nation with the authority to prosecute voter fraud—a fact which Dr. Glenda Overstreet of the Kansas NAACP testified may indicate exactly such a procedural irregularity raising questions of improper intent.¹³⁴

In addition, Professor Levy raised question about the structure of the SAFE Act itself, in that its requirement for proof of citizenship at the time of voter registration only applies after July 1, 2013.¹³⁵ As such, while this requirement may affect some older voters who moved from out of state after this date, “it applies to everyone who wasn’t 18 as of July 1st, 2013.”¹³⁶ He concluded, “that might create a problem under the 26th Amendment if that’s viewed as discrimination or if you could prove that there was an intent to exclude younger voters, perhaps because of their political affiliations or leanings.”¹³⁷

Finally, concern regarding the intent of the SAFE Act stemmed from testimony regarding recent cases of voter fraud in the state. Secretary Kobach himself testified that every allegation of voter fraud his office has prosecuted since receiving prosecutorial authority in 2015 has involved

¹³¹ Levy Written Testimony, pp. 07-09 (Appendix x)

¹³² Levy Testimony *Transcript* p. 16 line 24 – p. 17 line 14

¹³³ Levy Testimony *Transcript* p. 16 lines 06-23; Levy Written Testimony, pp. 06-07 (Appendix)

¹³⁴ Overstreet Testimony *Transcript* p. 115 line 14 – p. 115 line 09; p. 87 lines 07-15; *See also*: Bonney Testimony, *Transcript* p. 67 lines 02-13

¹³⁵ Levy Testimony *Transcript* p. 24 line 13 – p. 25 line 04

¹³⁶ Levy Testimony *Transcript* p. 24 line 13 – p. 25 line 04

¹³⁷ Levy Testimony *Transcript* p. 24 line 13 – p. 25 line 04

individuals who have voted twice, often in two or more different jurisdictions.¹³⁸ Instead of focusing on preventing problems with such “double-voting” however, attorney Mark Johnson testified that much of the debate around the adoption of the SAFE Act was focused on preventing undocumented immigrants from registering to vote: “In the spring of 2011 the advocates of the SAFE Act told the legislature that voter impersonation was rampant and untold numbers of aliens were voting.”¹³⁹ However, Mr. Johnson asserted that the cases of voting fraud that have been identified have not substantiated this concern.¹⁴⁰ He concluded, “We have to determine whether the state of rationale for the legislation has been borne out by the facts.”¹⁴¹ “There have been no cases filed involving aliens voting in Kansas”¹⁴² Such a disconnect between the SAFE Act’s purported intent of preventing noncitizens from voting, and actual cases of voter fraud involving U.S. citizens who have illegally voted in more than one jurisdiction, may raise further concern regarding the intent of the legislation.

2. *Disparate Impact*

Testimony from a majority of panelists throughout the Committee’s hearing indicated concern that in addition to a general deterrent effect, the Kansas SAFE Act may pose a disproportionate burden on certain groups of citizens, many of whom fall into federally protected classes. A number of examples illustrate such concern below:

Age

- Dr. Michael Smith compared U.S. census tract data with available data on suspense voters in Kansas and found a significant relationship between the age of citizens in each county and the number of suspense voters.¹⁴³ University campuses were particularly likely to have high numbers of suspense voters—The University of Kansas having the highest percentage of suspense voters of any census tract in the state.¹⁴⁴

¹³⁸ Kobach Testimony, *Transcript* p. 249 lines 03-10; *See also*: Leiker, Amy Renee. “Wichita man pleads guilty in Kansas voter fraud case.” *The Wichita Eagle*, May 4, 2016. Available at: <http://www.kansas.com/news/local/crime/article75545277.html> (last accessed December 30, 2016)

¹³⁹ Johnson Testimony, *Transcript*, p. 155 lines 14-21

¹⁴⁰ Johnson Testimony, *Transcript*, p. 156-157; p. 158 lines 06-18

¹⁴¹ Johnson Testimony, *Transcript*, p. 155 line 22- p. 156 line 06

¹⁴² Johnson Testimony, *Transcript*, p. 157 lines 17-18

¹⁴³ Smith Testimony, *Transcript*, p. 40, line 09 – p. 41 line 25

¹⁴⁴ Smith Testimony, *Transcript*, p. 35 lines 12-24

- Mr. Doug Bonney of the Kansas ACLU testified that in September 2015, voters under the age of 30 made up about 15 percent of registered voters in Kansas, but more than 40 percent of those on the suspense voter list because they were lacking citizenship documentation.¹⁴⁵
- Ms. Marge Ahrens discussed how prior to the SAFE Act, the Women Voters of Kansas registered young people in public venues such as libraries and high schools; however, with the proof of citizenship requirement there is little value because young voters no longer possess the required documentation and may not know how to acquire it.¹⁴⁶ Ms. Ahrens further testified that “high school registration turnout...is very low across the state. Young adults and the poor move more than any group, and they have the weakest hold on their documents of any group.”¹⁴⁷
- Mr. Jaime Shew testified that “administrative challenges are the largest impediment to the participation of younger voters. In 2014 we found out the largest group of voters in suspense were 18 to 24 years of age, and they are also the quickest to say, ‘Forget it. I’ve got stuff going on.’”¹⁴⁸
- Mr. Michael Byington testified that these identification requirements disproportionately burden people who struggle with mobility, including the elderly, for whom it is more difficult to access transportation to get an ID and more difficult to manage all of the required documentation.¹⁴⁹

Sex

- Ms. Cheyenne Davis, a Field and Political Director for the Kansas Democratic Party, testified “if [women] have changed their names, then that is reflected in a paper trail that could be scattered across the country.”¹⁵⁰ Ms. Davis described her work with one woman who paid \$75 for her birth certificate from another state. She then had to get her marriage

¹⁴⁵ Bonney Testimony, *Transcript*, p. 68 lines 12-25

¹⁴⁶ Ahrens Testimony, *Transcript*, p. 137 lines 03-11

¹⁴⁷ Ahrens Testimony, *Transcript*, p. 137 lines 11-16

¹⁴⁸ Shew Testimony, *Transcript*, p. 169 line 25- p. 170 line 06

¹⁴⁹ Byington Testimony, *Transcript*, p.120 lines 03-19

¹⁵⁰ Davis Testimony. *Transcript*, p. 131 line 13 – p. 132 line 04

decree, and divorce decree—both from different states—in order to complete her registration.¹⁵¹

- Representative Jim Ward also testified about a bill he proposed to combat the fact that “women [are] disproportionately affected by the documentation requirement” due to marriage and divorce changes in name.¹⁵²
- Ms. Elle Boatman wrote that it can be difficult or nearly impossible for transgender/gender non-conforming people to obtain documentation that reflects their legal/preferred name and gender identity, and the process for changing these documents is complex and cost-prohibitive. This leaves transgender/gender non-conforming people at risk of experiencing violence and rejection at their polling place if their identification does not “look” like them.¹⁵³
- Mr. Shew also testified that single parents, who are most often women, reported an inability to find the time to maneuver bureaucratic requirements to obtain the required documentation.¹⁵⁴

Disability

- Mr. Michael Byington testified that the SAFE Act identification requirements disproportionately burden people who struggle with mobility, including the elderly, people with mental or physical disabilities, or those with visual or hearing impairments, for whom it is more difficult to access transportation to get an ID and more difficult to manage all of the required documentation.¹⁵⁵ Byington pointed out that, “if you’re blind or visually impaired significantly, you’re probably going to have to hire someone to help you locate that document if you need it for purposes of voter registration.”¹⁵⁶
- Mr. Shew and Mr. Kip Elliot’s testimony supported this concern citing concern for people with mental illness or physical disabilities who are living in assisted living or skilled nursing facilities.¹⁵⁷ For this population, access to transportation and funds is

¹⁵¹ Davis Testimony, *Transcript*, p. 131 line 13 – p. 132 line 04

¹⁵² Ward Testimony, *Transcript* p. 217 line 19-p.218 04

¹⁵³ Boatman Written Testimony, p. 26 (Appendix x)

¹⁵⁴ Shew Testimony, *Transcript*, p. 170 lines 07-16

¹⁵⁵ Byington Testimony, *Transcript*, p. 261 line 02 – p. 264 line 05

¹⁵⁶ Byington Testimony, *Transcript*, p.120 lines 10-15

¹⁵⁷ Shew Testimony, *Transcript*, p. 164 line 14 – p. 165 line 16

difficult, but they also may not meet requirements for permanent advanced voting, indicating that someone medically cannot leave their residence.¹⁵⁸

Race/Color

- Disability rights advocate Mr. Michael Byington described his work with one African American individual, who was born outside of Kansas in the southern U.S. in the 1930s. This gentleman told Mr. Byington, “they just weren’t very careful about maintaining birth certificate records for people of ... my skin tone back in the 1930s when I was born.” Mr. Byington reported that this man “ended up simply not registering to vote because he could not get the birth certificate.”¹⁵⁹
- Dr. Michael Smith provided evidence that there was a correlation between high African American population and an increase in suspense voter percentage, potentially suggesting that African American voters may be disproportionately represented on the suspense voters list.¹⁶⁰

The following groups of people potentially disparately impacted by the SAFE Act are not federally protected categories, however the Committee’s mandate is to take consideration of all citizen’s right to vote and to have their vote counted. While these categories are not officially protected, these categories may intersect with other protected categories or otherwise threaten election integrity.

Income/Poverty

- Dr. Michael Smith provided evidence indicating there was a relationship between high levels of voters below the poverty line and more suspense voters suggesting that the proof of citizenship requirement may disproportionately impact poor voters.¹⁶¹ Dr. Smith also suggested that this relationship may also indicate a disproportionate impact on people of color, but it is difficult to disassociate race from the poverty finding.¹⁶²

¹⁵⁸ Shew Testimony, *Transcript*, p. 164 lines 14-23; Elliot Testimony, *Transcript* p. 73 line 06 – p. 74 line 25

¹⁵⁹ Byington Testimony, *Transcript*, p. 121 lines 12-23

¹⁶⁰ Smith Testimony, *Transcript*, p. 42 lines 01-05

¹⁶¹ Smith Testimony, *Transcript*, p.42 lines 06-13

¹⁶² Smith Testimony, *Transcript*, p. 42 lines 01-13

- Mr. Shew testified that citizens without permanent homes had greater difficulty obtaining and keeping track of documents required to vote.¹⁶³
- Ms. Ahrens also indicated that “persons of limited means” are overburdened by these identification requirements.¹⁶⁴
- Ahrens indicated that “young adults and the poor move more than any group, and they have the weakest hold on their documents of any group.”¹⁶⁵
- Dr. Smith’s analysis revealed high numbers of suspense voters around college campuses, though he also noted some evidence to suggest that suspense voters in college and university towns are more likely to provide the follow up documentation necessary to complete their registration.¹⁶⁶ Dr. Smith concluded, “It makes me worry about younger voters that are not university students, maybe living in those high poverty census tracts, that we’re not seeing them pop up as having a lot of completers.”¹⁶⁷

Political Affiliation

- Dr. Smith found that suspense voters were also far more likely to be unaffiliated and far less likely to register as Republican.¹⁶⁸ Furthermore, suspense voters tend to be concentrated in certain census tracks, such as in Johnson County, suburban Kansas City, Sedgewick County/Wichita, Shawnee County, and Douglas County.¹⁶⁹

D. Addressing Voter Fraud

- The importance of election integrity
- Risk of voter disenfranchisement
- Comparison to other countries voting systems
- Potential solutions

¹⁶³ Shew Testimony, *Transcript*, p. 165 17-22

¹⁶⁴ Ahrens Testimony, *Transcript*, p. 142 lines 01-04

¹⁶⁵ Ahrens Testimony, *Transcript*, p. 137 lines 14-22

¹⁶⁶ Smith Testimony, *Transcript*, p. 59 line 08 – p. 61 line 09

¹⁶⁷ Smith Testimony, *Transcript*, p. 61 lines 10-14

¹⁶⁸ Smith Testimony, *Transcript*, p. 31line 18- p. 32 line 22

¹⁶⁹ Smith Testimony, *Transcript*, p. 55

V. FINDINGS AND RECOMMENDATIONS

Among their duties, advisory committees of the U.S. Commission on Civil Rights are authorized to advise the Commission (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.¹⁷⁰ The [State] Advisory Committee heard testimony that ...

A. Findings

B. Recommendations

¹⁷⁰ 45 C.F.R. § 703.2

VI. APPENDIX

DRAFT

Kansas Advisory Committee to the United States Commission on Civil Rights



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